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No. 93-1422

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROSEMARY WEISSICH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether California law or the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioners' action for the failure of the Bureau of Alcohol, Tobacco and Firearms and the United States Probation Service to warn petitioners' decedent that his life might be at risk from a federal probationer he had prosecuted in state court more than 30 years earlier.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A12) is reported at 4 F.3d 810. The opinion of the district court (Pet. App. A13-A17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1993, and a petition for rehearing was denied on November 4, 1993 (Pet. App. A2). The petition for a writ of certiorari was filed on February 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1955, petitioners' decedent William O. Weissich, the District Attorney for Marin County, California, prosecuted Malcolm Schlette for arson. Schlette was convicted and sentenced to 20 years' imprisonment. At that time, Schlette threatened to retaliate by killing the district attorney, the judge, the jurors, the police officers, and all the witnesses involved in his conviction. Schlette was released on state parole in 1966, but he was returned to prison to serve the remainder of his term after authorities discovered that he planned to carry out his prior threats. In 1975, Schlette completed his full term and was released without supervision. Pet. App. A6.

In January, 1983, Schlette was arrested by the Bureau of Alcohol, Tobacco and Firearms (ATF), a federal agency. He pleaded guilty to being a felon in possession of firearms and was placed on federal probation for five years. Three years later, in November, 1986, he shot and killed William Weissich and then committed suicide by ingesting poison. Pet. App. A6, A13.

2. Petitioners sued Marin County, the State of California, and others in state court, contending that state law enforcement authorities had promised Weissich that they would warn him about continuing criminal conduct by Schlette, and that they had failed to exercise their duty to do so. They also sued the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2674. The district court held the federal case in abeyance until the California Supreme Court denied review of the California Court of Appeal's affirmance of the dismissal of the state case. See *Weissich* v. *County of Marin*, 274 Cal. Rptr. 342 (Cal. Ct. App. 1990), review denied (Cal. Jan. 30, 1991).

3. In February, 1992, the district court entered summary judgment for the United States (Pet. App. A15). The court assumed *arguendo* that the discretionary function exception to the FTCA did not apply, and considered whether the United States could be liable to petitioners under state law (*id.* at A14). The court noted that California law imposes no duty to control the conduct of another or to warn those endangered by such conduct except, as arguably pertinent here, where there is a "special relationship," similar to the doctor-patient relationship, between the defendant and the perpetrator (*id.* at A15). The court assumed *arguendo* that there was such a special relationship between Schlette and the United States during the period between January, 1983, when Schlette was arrested on federal charges, and November, 1986, when Schlette killed petitioner's decedent. Nevertheless, the court found that the United States had no duty to warn Weissich about any danger posed by Schlette during this period because there was no evidence that, during that time, the United States learned of any actual conduct by Schlette that suggested a danger to Weissich (*id.* at A16).

The district court also rejected petitioners' claims based on negligent supervision by the Probation Service (Pet. App. A16). The court first noted that, under the FTCA, it was required to determine whether private parties would be liable under the relevant state law in like circumstances (*ibid.*). Since private parties do not act as probation officers, the court considered whether California law would make a county probation department liable for negligent supervision of a probationer.[1]

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[1] This accurately reflects the Ninth Circuit's rulings on this subject. See *Louie* v. *United States*, 776 F.2d 819, 825 (1985); *Gallea* v. *United States*, 779 F.2d 1403, 1407 (1986) (Kennedy, J., concur-

The court observed that such liability would exist only if the injury were proximately caused by a county probation officer's breach of a mandatory duty, and that proximate cause would be absent if performance of the mandatory duty would not necessarily have prevented injury to the third party (*ibid.*). The court concluded that any negligence in supervising Schlette did not proximately cause Weissich's murder, because even "adequate, non-negligent supervision of Schlette while he was on probation would not necessarily have prevented Weissich's murder" (*ibid.*). The court therefore granted summary judgment for the United States (*id.* at A17).

4. a. The court of appeals affirmed, but on other grounds. The court of appeals held that the district court lacked subject matter jurisdiction over the case because the decisions made by the ATF and the Probation Service fell within the ambit of the discretionary function exception to the FTCA. As to the actions of the ATF, the court first noted that the plaintiffs had identified "no federal statute, regulation or policy mandating that ATF officers warn potential victims" (Pet. App. A7). The decision whether to warn was therefore a matter of "discretionary choice" for the ATF (*ibid.*), and this choice implicated policy concerns:

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ring); *Doggett* v. *United States*, 875 F.2d 684, 689 (1989); *Aguilar* v. *United States*, 920 F.2d 1475, 1477, 1479 (1990). However, the FTCA expressly provides, in 28 U.S.C. 2674, that the United States shall be liable only to the same extent as "a private individual" would be under like circumstances. Because private individuals do not act as probation officers, this express statutory limitation arguably precludes all federal liability for negligent probation supervision, even if particular States have elected to make their probation agencies liable for negligent supervision.

> These concerns include how much of the agency's resources it should commit to identifying victims, what standard it should adopt to determine which potential victims to notify, and how it should go about notifying them. An analysis of these concerns would likely include consideration of budgetary constraints as well as time and personnel limitations.

Id. at A7-A8.

The court held that the Probation Service was also protected by the discretionary function exception. Although probation guidelines (Pet. App. A8) provide that probation officers have a duty to warn "specific third parties of a particular prospect of harm, physical or financial, which the officer 'reasonably foresees' the probationer may pose to them" (emphasis omitted), the court held that the discretionary function exception nevertheless applied because these guidelines "require [officers] to make independent policy judgments" (*id.* at A10). The guidelines give probation officers discretion to give warnings based on the officer's judgment, in each specific case, whether it is reasonably foreseeable that a risk of harm to a specific third party exists (*ibid.*). These judgments implicate the dual obligations of probation officers to protect the public and to promote the rehabilitation of the probationer, and "[b]ecause these interests may conflict, officer discretion in balancing them is inherent" (*ibid.*).

b. For similar reasons, the court also rejected the claims based on alleged negligent supervision by the Probation Service.[2] "[W]hen and how a probationer will report [to the probation officer] implicates a discre-

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[2] Petitioners have abandoned their negligent supervision claim in this Court.

tionary choice by the probation officer" (Pet. App. A11). To balance the officer's dual obligations to protect the public and to promote rehabilitation of the probationer, "a probation officer must establish a supervisory plan which both promotes the rehabilitation of the probationer and causes the least possible harm to the public. This balancing of interests necessarily involves policy decisions on matters such as public safety, allocation of scarce resources, and the likelihood of rehabilitation" (*ibid.*). As the court observed:

> Perhaps the officers should have decided to supervise Schlette more closely. Perhaps, as the Weissichs suggest, unannounced home visits might have been more appropriate. These are judgment calls, however. They are made by a probation officer in the context of balancing the policy considerations previously mentioned. As such, they are discretionary functions.

Id. at A11-A12.

ARGUMENT

This case does not warrant further review, because the district court was plainly correct in holding that, under California law, the ATF and the Probation Service did not have a duty to warn Weissich about a possible danger to him from Schlette. Regardless of the application of the discretionary function exception, therefore, the United States would not be liable to petitioners under the FTCA. The court of appeals also applied the correct standards for determining the discretionary function issue, and its fact-specific holding that petitioners' claims are barred by the discretionary function exception does not conflict with any decision of this Court or any other court of appeals.

1. As the district court correctly held (Pet. App. A15-A16), petitioners would not state a claim against the United States under the FTCA even if the discretionary function exception did not apply. Under California law, the ATF and Probation Service were not under a duty to warn Weissich that Schlette posed a danger to his life.

Under California law, "[a]s a rule, one has no duty to come to the aid of another." *Williams* v. *State of California*, 664 P.2d 137, 139 (Cal. 1983). More particularly, one has "no duty to control the conduct of another * * * nor to warn those endangered by such conduct." *Tarasoff* v. *Regents of the University of California*, 551 P.2d 334, 343 (Cal. 1976) (citations omitted). A narrow exception to this rule exists when "there is some special relationship between [persons] which gives rise to a duty to act," *Zepeda* v. *City of Los Angeles*, 272 Cal. Rptr. 635, 636 (Cal. Ct. App. 1990), such as "(a) a special relation . . . between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation . . . between the actor and the other which gives to the other a right of protection." *Tarasoff*, 551 P.2d at 343 (quoting Restatement (Second) of Torts § 315 (1965)).

The district court held that there was no "special relationship" between Weissich and the ATF or the Probation Service that gave Weissich a "right of protection," and petitioners do not argue otherwise.[3]

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[3] Petitioners do not contend, for example, that the ATF and the Probation Service promised Weissich that they would warn him about any threats against his life made by Schlette. This case thus stands in contrast to petitioners' state-court case, where they claimed that state law enforcement authorities had made such a promise to Weissich. The California Court of Appeal held in that case that the state agencies had no duty to warn Weissich because, among other reasons, "Weissich was well aware that Schlette had

However, the district court assumed *arguendo* that a "special relationship" existed between Schlette and the Probation Service after Schlette was placed on probation, because the Probation Service might have had the right to control Schlette's conduct. Pet. App. A15. Even so, the district court held that the Probation Service had no duty to warn Weissich because there was no evidence that the Probation Service knew of any threats made by Schlette against Weissich after Schlette was placed on probation. As the district court stated, "there is no evidence that, in the period between the January 1983 arrest and Weissich's murder, [the] United States learned of any conduct by Schlette that: (a) actually occurred during this period; and (b) suggested a danger to Weissich specifically." *Id.* at A16.[4] The absence of such evidence is fatal to petitioners' claim, because the California duty to warn that they invoke does not exist in the absence of a specific threat made against a specific victim. See *Thompson* v. *County of Alameda*, 614 P.2d 728, 735 (Cal. 1980).

2. Further review is also unwarranted because the court of appeals reviewed the discretionary function

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plans for revenge which persisted throughout his 20-year prison sentence; as a result, Schlette's potential for violence must necessarily have been of concern to Weissich even absent any knowledge of Schlette's subsequent criminal conduct." *Weissich* v. *County of Marin*, 274 Cal. Rptr. at 349.

[4] The district court did note that Schlette had made plans to murder Weissich before 1983, and that those plans resulted in Schlette's arrest and the confiscation of his firearms. Pet. App. A15. Between Schlette's release from prison on the completion of his sentence in 1975 and his arrest in 1983, however, Schlette was free of federal custody, and so the United States had no "special relationship" with him that would have given law enforcement agencies the right to control his conduct.

question under the correct legal standards, set forth by this Court in *United States* v. *Gaubert*, 499 U.S. 315 (1991), *Berkovitz* v. *United States*, 486 U.S. 531 (1988), and *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984). Applying these standards, the court concluded that petitioners' claim based on a failure to warn was barred by the discretionary function exception. That conclusion does not conflict with any decision of this Court or any other court of appeals.

a. "[W]hether the discretionary function exception bars a suit against the Government is guided by several established principles." *Berkovitz*, 486 U.S. at 536. "The exception covers only acts that are discretionary in nature, acts that 'involv[e] an element of judgment or choice.'" *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536). "Furthermore, even 'assuming the challenged conduct involves an element of judgment,' it remains to be decided 'whether that judgment is of the kind that the discretionary function exception was designed to shield.'" *Gaubert*, 499 U.S. at 322-323 (quoting *Berkovitz*, 486 U.S. at 536).

The court of appeals concluded that the ATF was shielded by the discretionary function exception under these principles. As the court noted, no federal statute, regulation or policy specifically required that warnings be issued in a case such as this (Pet. App. A7, A10). In fact, petitioners cited no policy at all regarding warnings by the ATF (*id.* at A7). Thus, the decision whether to warn Weissich was entirely a matter of "discretionary choice" for the ATF (*ibid.*).

As the court of appeals recognized, the ATF cannot possibly give warnings to everyone who might be at risk from a probationer. At the time of his state conviction, Schlette threatened to retaliate by killing the district

attorney, the judge, the jurors, the police officers, and all the witnesses involved in his conviction (Pet. App. A6). Even if the ATF had known that Schlette posed a threat to some of these people more than 30 years after his conviction (which was not the case, see *id.* at A16), the tasks involved in identifying them and tracking them down would have been immense. When these numbers are multiplied by the thousands of probationers, parolees, and suspects encountered daily by federal law enforcement agencies, it becomes clear that notification of everyone potentially at risk cannot be mandated. The decision whether to notify possible victims thus implicates "how much of the agency's resources it should commit to identifying victims, what standard it should adopt to determine which potential victims to notify, and how it should go about notifying them" (Pet. App. A7-A8).

b. As to the Probation Service, the court of appeals correctly looked first to that Service's policy to determine whether it gave the Service discretion, and then considered whether that discretion was the kind that the discretionary function exception protects. The text of the Probation Service guidelines supports the court of appeals' decision on both issues.

First, as the court of appeals noted (Pet. App. A10), the guidelines do not require that probation officers review probationers' files at any particular time to determine whether probationers pose a threat to anyone. The guidelines provide that "the circumstances of probationers 'should' be reviewed periodically" to assess their danger to third persons (*ibid.*). The court of appeals interpreted this language to be "suggestive, not mandatory" (*ibid.*). Under this reading, the decision to review probationers' circumstances "involv[es] an element of judgment or choice." *Gaubert*, 499 U.S. at

322. That this judgment is exercised by individual probation officers does not make it any less "discretionary" for purposes of the discretionary function exemption. See *Varig Airlines*, 467 U.S. at 820.

The judgment at issue in this case also implicates policy considerations. As the court of appeals noted (Pet. App. A10), the Probation Service's guidelines specifically direct probation officers to consider the impact on the probationer's rehabilitation and the risk to the public when deciding whether to warn another of a possible threat. Even if the probation officer determines that a reasonably foreseeable risk to another person exists, that officer still must decide whether to give a warning, "based upon the seriousness of the risk created and the possible jeopardy to the probationer's employment or other aspects of his rehabilitation."[5] Pet. App. A9. These judgments are "decisions grounded in social, economic, and political policy." *Gaubert*, 499 U.S. at 323.

c. Nor does the decision below conflict with other appellate decisions holding that duty to warn claims are not covered by the discretionary function exception, as petitioners contend (Pet. 10-11). The Ninth Circuit did not hold that a tort action against the United States based on a duty to warn always implicates the discretionary function exception, as petitioners suggest (*id.* at 9), and such a ruling would have been contrary to prior case law of that circuit. See, *e.g.*, *Summers* v. *United States*, 905 F.2d 1212 (9th Cir. 1990) (National Park Service's failure to warn of potential danger from stepping on hot coals on public beach did not fall within

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[5] Even if a reasonable risk to another person exists, the probation officer is nevertheless authorized to give no warning to that person but, for example, to increase supervision of the probationer (Pet. App. A9-A10).

discretionary function exception). The court of appeals held only that, in this case, the duty to warn alleged by the petitioners implicated policy considerations.

This case is distinguishable on its facts from the other two decisions on which petitioners rely (Pet. 10-11). In *Dube* v. *Pittsburgh Corning*, 870 F.2d 790 (1989), the First Circuit held that the Navy's alleged failure to warn the daughter of a shipyard worker about the dangers of exposure to asbestos was not grounded in any policy decision or consideration. The First Circuit observed that "it is difficult to imagine the Navy justifying a decision not to issue a simple warning to domestic bystanders of such potentially devastating danger, based on economic or other policy grounds." *Id.* at 800. By contrast, in this case, the Probation Service's guidelines on whether to warn a potential victim of danger from a probationer are explicitly based on policy considerations, including the possible threat to the probationer's rehabilitation. See Pet. App. A10.

In *Smith* v. *United States*, 546 F.2d 872 (1976), the Tenth Circuit held that Yellowstone National Park's failure to post warning signs about the danger of falling into a thermal pool was not part of the exercise of a discretionary function. The Tenth Circuit stressed in that case that the Park Service's decision not to post warning signs was not, and could not have been, based on a policy decision to leave certain parts of the park undeveloped. According to the court, "[t]he decision to develop only certain areas did not create the problem or the need to decide whether warning signs should be erected. Rather, the need to make the latter decisions

has existed ever since Yellowstone was open to the public." *Id.* at 877.[6]

The Ninth Circuit's analysis in this case of the discretionary function exception did not differ in any significant way from the First Circuit's analysis in *Dube* or the Tenth Circuit's approach in *Smith*. Further review of its fact-specific decision is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] The court also pointed to evidence in the record indicating that the decision not to post warning signs was, in fact, unrelated to any policy about development in the park. 546 F.2d at 877 n.5.